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Nos. 85-1377, 85-1378, and 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES,
Appellant,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

UNITED STATES SENATE,
Appellant,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Appellants,

v.

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On Appeals from the United States District Court for the District of Columbia

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BRIEF OF HOWARD H. BAKER, JR., AS *AMICUS CURIAE*

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QUESTION PRESENTED

Whether the assignment of fact-finding tasks to the Comptroller General by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, violates the constitutional separation of powers doctrine merely because the Comptroller General is removable for cause by joint resolution of Congress which then is subject to Presidential approval or veto.

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BRIEF OF HOWARD H. BAKER, JR. AS *AMICUS CURIAE*

Howard H. Baker, Jr. respectfully submits this Brief as *Amicus Curiae* in support of the appellants' position that the automatic spending reduction provisions of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985), are constitutional. Written consent to the filing of this brief has been obtained from all parties. Copies of those consent letters have been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

United States Senators Phil Gramm, Warren B. Rudman, and Ernest F. Hollings, the three principal sponsors of what ultimately became the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Act"),[1] have requested that I file a brief as *amicus curiae* in these cases. This task is not undertaken lightly. As a former member of the Legislative Branch, I can attest that the reductions in budgetary expenditures that will be compelled by the Act, if it is upheld, will not be universally popular and that proponents of the Act may suffer resulting political consequences. However, the enormous federal deficit constitutes a national emergency. As a friend of the Court, I hope that this brief will assist in deciding the constitutional issues presented in these cases by illuminating the workings of the modern budgetary process and by providing a different and broader perspective of the Act.

This perspective was obtained through eighteen years in the United States Senate, eight years in the Leadership, and four years as Majority Leader. During those years the Senate and its Leadership grappled continually,

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[1] Originally introduced in the Senate by Senators Gramm, Rudman, Hollings and others, S. 1072, 99th Cong., 1st Sess., 131 Cong. Rec. S12082 (daily ed. Sept. 25, 1985), subsequently attached by Senator Dole as an amendment to legislation raising the ceiling on the federal debt from $1.823 trillion to $2.079 trillion, H.R.J. Res. 372, 99th Cong., 1st Sess., 131 Cong. Rec. S12622 (daily ed. Oct. 4, 1985), the Act also is known as the Gramm-Rudman-Hollings Balanced Budget Amendment.

and increasingly unsuccessfully, with the problem presented by immense federal deficits. My perspective, however, deals not so much with the enormity of the problem, which must be obvious,[2] but rather with the prior unsuccessful attempts to resolve the problem, and, should the Act be invalidated, the practical political reality which renders the possibilities of obtaining another solution nearly non-existent. This legislation is singularly significant because it constitutes the best effort of the Congress in the last two decades to deal with the fiscal crisis confronting this government. This is emergency legislation not only because it is intended to solve a national budgetary crisis, but also because it is the only measure now available or realistically that will be available in the future to solve that crisis. It succeeds where prior efforts have failed.

Having been intimately involved in those prior unsuccessful efforts, I have a strong interest in the preservation of the action-forcing mechanism represented by the automatic spending reductions in the Act. While some of the parties certainly share this interest, my involvement in the process spans a different time period and provides a different perspective. Accordingly, I respectfully submit this brief in an effort to assist the Court in its consideration of the constitutional issues raised by these cases.

STATEMENT OF THE CASE

The Comptroller General's Participation in The Automatic Spending Reductions Under The Act.

The Act addresses the federal debt crisis by, first, establishing maximum deficits for 1986 and the following five fiscal years and, second, imposing automatic, across-

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[2] Estimates of the Office of Management and Budget indicate that, by the late 1980's, annual interest outlays on the federal debt will rise to levels between $160 and $180 billion. First Concurrent Resolution on the Budget—Fiscal Year 1985: Hearings Before the Senate Committee on the Budget, 98th Cong., 2d Sess. 69 (1984) (testimony of David A. Stockman, Director, OMB).

the-board spending cuts in all but those budget items designated exempt in order to preclude a deficit in excess of that maximum amount. The Act assigns the Comptroller General a fact-finding and reporting function in this process. Applying the detailed assumptions and guidelines supplied by the Act, he is required to estimate the deficit for the upcoming fiscal year, determine the deficit excess over the maximum deficit amount, and calculate the amount of the reduction in each budget category necessary to eliminate that deficit excess. Act §§ 251(a)(3), 251(a)(6), 251(b). These same estimates and calculations also are made under the Act by the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO"). However, the findings of the OMB and the CBO are only advisory aids to the Comptroller General. It is the reported findings of the Comptroller General that form the basis of a Presidential sequestration order enforcing the budget cuts. Act § 252(a)(1). The Comptroller General's fact-finding and reporting functions are thus integral parts of the Act's automatic spending reduction mechanism.

The President and the Congress can avoid implementation of that automatic spending reduction mechanism by producing a budget resulting in a deficit equal to, or less than, the Act's maximum deficit level. Act §§ 252(c), 254(b). In the event of judicial invalidation of the automatic spending reduction mechanism, the Act provides for the submission to the Congress of the reports by the CBO and OMB, so that the Congress can consider enacting the same spending cuts called for in those reports. Act § 274(f). Absent the automatic spending reduction mechanism, however, there is no requirement that the Congress adopt the spending cuts suggested by those reports. Nor is the Congress required to make any other spending reductions. The automatic spending reduction mechanism provided in the Act thus forces the very budget restraint that has eluded lawmakers for many years.

The Proceedings Below.

The plaintiffs in the District Court made a two-pronged constitutional challenge to the Act. They argued that (1) the Act represents an unconstitutional delegation to the Comptroller General of legislative authority over appropriations and (2) the participation of the Comptroller General in the automatic spending reduction process violates the separation of powers doctrine, because the Comptroller General is not subject to removal by the President. The Department of Justice joined the plaintiffs in attacking as unconstitutional the Comptroller General's role under the Act, but defended the Act against the plaintiffs' claim of alleged unconstitutional delegation of legislative power. The United States Senate, the Speaker and the Bipartisan Leadership of the House of Representatives, and the Comptroller General intervened in defense of the Act's constitutionality.

The three-judge District Court concluded that the Act did not run afoul of any constitutional prohibition against undue delegation of legislative authority.[3] Considering the great deference afforded to the Congress by the Court on matters of delegation of legislative functions,[4] and the Act's provision of detailed guidelines to control the Comptroller General's performance of his fact-finding tasks, the District Court had little difficulty rejecting the first constitutional challenge to the Act.

Applying much stricter scrutiny to the removal powers issue, however, the District Court reached out to conclude that the separation of powers doctrine constitutionally disables the Comptroller General from performing the

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[3] *Synar* v. *United States*, No. 85-3945, slip op. (DDC Feb. 7, 1986) Joint Appendix 27, 54-55 (hereinafter cited as J.A.).

[4] The Court has invalidated statutes on the basis of unconstitutional delegation of legislative power in only two cases, both of which were decided over fifty years ago. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).

tasks assigned to him by the Act, because he is removable by joint resolution of the Congress subject to Presidential veto. In reaching that conclusion, the District Court focused on the functions performed by the Comptroller General under the Act in isolation from that officer's other duties, characterizing those isolated functions as purely executive in nature. J.A. 78. The District Court distinguished decisions by this Court concerning the removal powers issue as approving the Congressional restriction on Presidential removal power, but not sanctioning the assertion by the Congress of the right to confer that removal power on itself. J.A. 74-75. Despite the limited nature of the Congressional removal authority in this instance, the District Court found a violation of the separation of powers doctrine because the removal statute allegedly gives the Congress "control" over the Comptroller General who, in the District Court's estimation, performs purely executive functions under the Act. J.A. 75.

SUMMARY OF ARGUMENT

This Court's usual presumption of statutory constitutionality must be applied with great emphasis in these cases. The Act represents a concrete and detailed policy decision made by the Congress and the President to deal with record-breaking deficits that present a grave danger to the welfare of the government and the people of the United States. It represents the only currently available hope to solve the federal deficit crisis. The historical background of the budgetary process reveals the singular significance of this Act and requires the Court to afford it the highest presumption of constitutionality. In the plain absence of any constitutional necessity to nullify the Act, application of that presumption compels the affirmation of the Act's validity and the reversal of the District Court's decision.

The District Court not only failed to afford the Act the highest presumption of constitutionality, it reversed

that presumption entirely. Straining to avoid reasonable inferences and conclusions from the Constitution and prior decisions of this Court, the District Court erroneously held that the Comptroller General cannot constitutionally perform the fact-finding functions assigned to him under the Act because he is not dischargeable by the President. The District Court's finding of constitutional infirmity is required by neither the language of the Constitution nor the pronouncements of this Court.

Where, as here, there is clear Congressional intent to require independence from the President for officers whose functions are not "purely executive," the decisions of the Court recognize the constitutional authority of the Congress to restrict the power of the President to remove those officers. The functional analysis articulated in the Court's decisions, as applied to the duties performed by the Comptroller General, requires the conclusion that he is not a "purely executive" officer. The District Court discerns a constitutional defect in the Act only by erroneously focusing the analysis solely on the tasks assigned the Comptroller General under the Act and by mischaracterizing those duties as "purely executive." The Comptroller General's tasks under the Act clearly partake of the legislative, judicial and executive functions, and as such, cannot properly be characterized as "purely executive" in nature.

Where it falls within the constitutional capacity of the Congress to restrict or confer the removal power, no separation of powers violation is implicated merely because the removal is accomplished by the concurrent acts of the Congress in a joint resolution and the President via his approval or veto of such resolution. Because each is subject to Presidential approval or veto, the constitutional province of the Congress to remove the Comptroller General is no different from the Congressional authority to enact legislation abolishing the General Accounting Office of which the Comptroller General is head. As to those

officers whose functions are not "purely executive," the constitutionality of the latter action perforce establishes the constitutionality of the former.

ARGUMENT

I. AS A LEGISLATIVE AND EXECUTIVE RESPONSE TO A NATIONAL CRISIS, THE ACT IS ENTITLED TO THE HIGHEST PRESUMPTION OF CONSTITUTIONALITY.

By well established principles, the Court will indulge "[e]very possible presumption . . . in favor of the validity of a statute" in assessing its constitutionality. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 355 (1936) (Brandeis, J., concurring) (quoting the *Sinking-Fund Cases*, 99 U.S. 700, 718 (1879)). *See Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Recognizing that all statutes, whether enacted in response to a national emergency or otherwise, are subject to the demands of the Constitution, *see Immigration & Naturalization Service* v. *Chadha*, 462 U.S. 919, 945 (1983), the presumption of constitutionality should be given its full reach in light of the national crisis at hand. The crisis arises not only as a result of the titanic federal deficits, but also from the complete and utter inability of the Legislative and Executive Branches to deal with the deficit problem. This Act is the only successful effort to force a solution to the federal debt crisis which has been escalating without correction for the last two decades. Moreover, as a practical matter, it is likely to be the only available realistic solution in terms of future efforts as well. The historical overview of the budgetary process presented below reveals the circumstances that have preordained the failure of all previous efforts by the Congress and the President to solve the deficit crisis. That historical overview also portends the failure of future efforts at budgetary restraint, if the Act is invalidated.

While conferring on the Congress the dual powers to raise revenues and to spend, the Constitution does not require the Congress to confine expenditures to an amount equal to the government's revenues raised through taxes or responsible borrowing. As a matter of practice rather than constitutional duty, the President proposes a nexus between expenditures and revenues in the budget he sends to the Congress. Depending in part upon the then-existing political circumstances, the Congress either has adopted a budget based in large measure on the President's proposal, or has used the President's budget proposal as a point of departure for the Congress' budgetary efforts. Most recently, the President's suggested budget has been summarily rejected by the Congress. Having no constitutional constriction requiring the balancing of expenditures with revenues, and having rejected any increase in the President's statutory budget authority, the Congress attempted self-imposed budget balancing efforts. However, despite conscientious hard work, those efforts did not succeed.

The division of labor in Congress between those committees charged with authorizing expenditures and those charged with appropriating funds was contemplated as a bilateral plan for balancing revenues and expenditures. That plan soon deteriorated, however, as authorizing committees made an "end run" around the appropriations committees by appropriating funds in the guise of merely authorizing entitlement program expenditures. Unchecked by the appropriations committees, entitlement programs approved by the authorizing committees increased exponentially the government's required expenditures. Federal deficits mounted.

Given this lack of Congressional budget restraint, the President attempted to enforce budget-balancing by impounding funds in the early 1970's. Congress responded with the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at

2 U.S.C. §§ 681-688 (1974)). That statute called for a two-tiered approach whereby an initial concurrent budget resolution set budgetary targets for total federal revenues, expenditures, and the deficit or surplus. While the first resolution served only as an advisory guide to the authorizing committees, a second concurrent resolution was intended to establish binding ceilings on expenditures and floors under revenues. Once again, however, despite the tireless efforts of the Senate and House Budget Committees, the Congress found ways to bypass its own best budgetary intentions. The authorizing committees often found it expedient to avoid the goals of the first resolution. Moreover, the second resolution was seldom passed at all in the regular budget cycle, and, in any event, its enforcement mechanisms could be circumvented easily by majority vote or by other procedural means.

Many other efforts at budget restraint were tried and failed. The Congress enacted debt limit legislation, but now is forced to circumvent that self-imposed restraint by increasing, at least annually, the legal borrowing limit to (1) permit the borrowing necessitated by the growing deficit and (2) avoid bringing the federal government to a halt for lack of money. In addition, because individual appropriations bills increasingly are being delayed, or not passed at all, many federal agencies and programs now are funded by continuing resolutions, usually enacted at the eleventh hour or later. Thus, the government moves from financial crisis to financial crisis, with government agencies having to be shut down until the debt limit is increased or a continuing resolution is passed to provide necessary funding for operations.

In yet another budget-balancing effort, a constitutional amendment requiring a balanced budget was passed by the Senate. That amendment was not dealt with by the House. In a more recent effort to impose restraint on the budgetary process, the President repeatedly has called

for line-item veto power over appropriations. He has not received that power, and the budget crisis continues.

Given the complete absence of a legislative solution to the deficit crisis, more than thirty states have called for a constitutional convention to consider a balanced budget amendment. If convened, there is some doubt whether such a convention could be limited only to the balanced budget issue, and many are uncertain where such a convention might lead. Nevertheless, as the number of states calling for such a convention approached the required number, Congress remained paralyzed, unable to make the hard political choices necessary for self-imposed budget restraint.

The Act, the validity of which is at issue here, was enacted by the Congress and approved by the President against this historical backdrop. It is the first and only realistic action-forcing mechanism which ultimately will require the Congress to limit government expenditures to an amount no greater than revenues. The automatic spending reduction mechanism in the Act is the critically-needed catalyst, the "Sword of Damocles," which will force the Congress to balance the budget. The same forced budget restraint is not accomplished by the Act's alternative or "fallback" procedure, whereby the calculated budget reductions are reported to, and voted on, by Congress. That alternative procedure will result only in the same legislative deadlocks that always have precluded effective deficit reductions in the past. The invalidation of the automatic spending reduction mechanism thus would deal a fatal blow to any hope of deficit reduction under the Act.

The Framers of the Constitution presumably assumed that, without constitutional mandate, the Congress and the President could strike a balance between the government's spending powers and its power to generate reve-

nues. Recent history has proven the Framers to have been overly optimistic. They had no reason to anticipate a deficit crisis of the current proportions. The Act's automatic spending reduction mechanism represents the only realistic hope of a required balance between revenues and expenditures. It requires the Congress and the President to balance the federal budget.

In many respects, the Congress is the culprit and the Act is Congress' way of putting its own house in order. However, as a matter of political reality, it should not be assumed that invalidating this Act will result in new and different legislation accomplishing budget reform. It is simply not realistic to send the Congress back to the drawing board to try again to enact another debt-reduction measure. It has taken the Congress twenty years to make the hard political choices in this Act necessary to balance the budget. It is highly doubtful that the political risks required to pass the Act will be taken again by sufficient numbers in the Congress to permit passage of some alternative budget-balancing scheme.

In addition to considering the decisions of this Court, which clearly support the Act's validity, the presumption of constitutionality must play a major role in the Court's review of this legislation. By invalidating the automatic spending reduction provisions of the Act, the District Court not only failed to afford the Act the highest presumption of constitutionality, it stood that presumption on its head. The constitutionality of the Act can be confirmed by drawing reasonable inferences from the Constitution and this Court's decisions concerning the removal power and reasonably characterizing the nature of the Comptroller General's fact-finding tasks under the Act. The issue must be decided in favor of the validity of the statute.

II. THE LIMITED POWER OF THE CONGRESS TO REMOVE THE COMPTROLLER GENERAL, SUBJECT TO PRESIDENTIAL VETO, IS CONSTITUTIONALLY PERMITTED.

A. The Decisions of This Court Permit Congressional Participation in The Removal of The Comptroller General.

The Appointments Clause of the Constitution provides for the appointment of Officers of the United States by the President with the advice and consent of the Senate.[5] While the Appointments Clause defines the mode of selecting "Officers of the United States," [6] the Constitution

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[5] The Appointments Clause of the Constitution provides:

"[*The President*] *shall nominate, and by and with the Advice and Consent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and *all other Officers of the United States*, whose Appointments are not herein otherwise provided for, and *which shall be established by Law*: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, cl. 2 (emphasis added).

[6] Although the District Court found it unnecessary to decide the question, J.A. 61 n.23, there can be no doubt that the Comptroller General is an "Officer of the United States," rather than a "legislative officer." The Comptroller General is placed in office in accordance with the Appointments Clause—by appointment of the President with the advice and consent of the Senate. 31 U.S.C. § 703(a)(1) (1982). Appointment pursuant to the Appointments Clause is indicia of an Officer of the United States. See *Buckley* v. *Valeo*, 424 U.S. 1, 128 n.165 (1976) (noting appointment of Comptroller General in accordance with Appointments Clause); *Burnap* v. *United States*, 252 U.S. 512, 516 (1920) (officer status is "determined by the manner in which Congress has specifically provided for the . . . appointment thereto"). Considering the numerous important responsibilities imparted to that office, the Comptroller General also must be viewed as "exercising significant authority pursuant to the laws of the United States," the functional test articulated by the Court in *Buckley*, 424 U.S., at 126, for status as an Officer of the United States. The responsibilities of the

does not expressly address the manner of their removal. Indeed, the only language in the Constitution relating to the removal of Officers of the United States is that conferring on the Congress, and not the President, the power to subject "all Civil Officers of the United States" to impeachment for treason and other high crimes and misdemeanors. U.S. Const. Art. II, § 4; Art. I, § 2, cl. 5; Art. I, § 3, cl. 6.

Absent any express constitutional mandate concerning the removal power, a trilogy of the Court's decisions provides the framework for the removal power analysis. In the first of these three cases, *Myers* v. *United States*, 272 U.S. 52 (1926), the Court considered a statute permitting removal of a postmaster by the President with the advice and consent of the Senate. A divided Court held that the Congress could not constitutionally limit the President's power of removal with respect to that officer. The lengthy decision in *Myers*, which includes expansive language concerning Presidential removal power, was written by Chief Justice Taft, himself a former President. Chief Justice Taft's conclusion, that the removal power is constitutionally lodged exclusively in the President as a necessary incident of his power to appoint,[7] relies heavily upon an interpretation of the debates in the First Congress.[8] 272 U.S. at 164-176. In those debates, which are

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Comptroller General are not limited to "duties only in aid of those functions that Congress may carry out by itself," nor are those duties "sufficiently removed from the administration and enforcement" of law as to characterize them as purely legislative in nature. *Id.*, at 139. See *infra* n.12.

[7] Pursuant to the Appointments Clause, the appointment power is in fact exercised by the President and the Congress concurrently in that the Senate must advise and consent to the President's appointment. If removal power must necessarily share the same locus as the appointment power, then removal power should presumably be concurrently exercised as well. See L. Tribe, American Constitutional Law 188 & n.13 (1978).

[8] Chief Justice Taft also relied upon the duty imposed on the President by the Constitution to see that the laws are faithfully

known in constitutional literature as the "Decision of 1789," the Congress ultimately acquiesced in the authority of the President to remove the Secretary of Foreign Affairs. Reliance on those debates in the first Congress as authority for the proposition that removal power is constitutionally vested solely in the President is strongly criticized by many scholars.[9]

Regardless of the validity of Chief Justice Taft's conclusions, the *Myers* holding was restricted severely nine years later by the unanimous decision in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Rather than assuming that the constitutional power to remove is lodged exclusively with the President as an incident of the power to appoint, the Court in *Humphrey's Executor* applied a functional test to determine the locus of removal power. First, the Court focused on the functions of the officer at issue, a member of the Federal Trade Commission ("FTC"), as "neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id.*, at 624. The Court recognized that independent agencies,

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executed. *Id.*, at 163-164. Scholars have suggested that this reliance on the "faithfully executed" clause is suspect because (1) that clause involves language of duty rather than a conferral of power and (2) the executive duty to enforce the laws does not provide the President with unfettered discretion to determine the means of carrying out that duty. L. Tribe, *supra* n.7, at 187 n.7; Corwin, Tenure of Office and The Removal Power Under The Constitution, 27 Colum. L. Rev. 353, 384 (1927). See *Myers*, 272 U.S., at 177 (Holmes, J., dissenting).

[9] See C. Miller, The Supreme Court and The Uses of History 61-68, 205-210 (1969) (vote in the Senate concerning the removal issue was tied, with the Vice President casting the deciding vote); Corwin, *supra* n.8, at 360-369 (less than a third of the members of the House were of the opinion that the Constitution vested the President alone with removal power). See also R. Berger, Congress v. The Supreme Court 146-150 (1969) (the Congressional debate is not conclusive as a statement of constitutional position on removal power); L. Tribe, *supra* n.7, at 186 n.6 (even if the debates suggested a broad removal power, such conclusion was probably no more than a statement of policy rather than a constitutional command).

such as the FTC, may perform executive functions which are "collateral" to the discharge of their predominantly quasi-legislative or quasi-judicial powers. *Id.*, at 628 & n.*. When the functions of the office are predominantly quasi-legislative or quasi-judicial, the Court reasoned, Presidential removal power does not necessarily flow from the Constitution. *Id.*, at 629. The Court in *Humphrey's Executor* expressly limited the *Myers* holding to "purely executive" officers whose duties are "restricted to the performance of executive functions [and who are] charged with no duty at all related to either the legislative or judicial power." *Id.*, at 627.[10]

Having determined that the Commissioner was not a "purely executive" officer, the Court turned to the legislative history of the FTC Act, which clearly revealed the Congressional intent to maintain the separation of that body from political control. As the Court recognized, the Congress contemplated that the FTC would act as a "body of experts" remaining "independent of executive authority." *Id.*, at 625. Based on the Congressional concern that the FTC operate independently from the President, the Court concluded that the Congress had the constitutional authority to restrict the President's removal power. Although the precise question presented was the power of the Congress to preclude the President from discharging the FTC Commissioner without cause, *Humphrey's Exec-*

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[10] The Court likewise confined the significance of the "Decision of 1789" as follows:

"[T]he office under consideration by [the first] Congress [*i.e.*, Secretary of Foreign Affairs] was not only purely executive, but the officer one [sic] who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers." *Humphrey's Executor*, 295 U.S., at 631. See Corwin, *supra* n.8, at 365-366. James Madison, who participated in the "Decision of 1789" subsequently posited that a different removal rule should apply to the Comptroller of the Treasury due to the nature of his functions. *Id.*, at 366-367.

utor clearly refutes the notion that the power to remove necessarily follows the power to appoint in all instances. Under the *Humphrey's Executor* rule, the question of Congressional removal power depends "upon the character of the office." *Id.*, at 631. Those offices involving functions properly characterized as "purely executive" in nature invoke illimitable Presidential removal power under *Myers*. Congressional removal authority over those officers exercising functions not "purely executive" in turn depends upon Congressional intent that the officer act independently from the President.

In the final decision of the removal powers trilogy, *Wiener* v. *United States*, 357 U.S. 349 (1958), the Court implied a Congressional restriction on the ability of the President to remove even absent a statute addressing the mode of removal. Implementing the functional test for removal power established in *Humphrey's Executor*, the Court first determined that the office of War Claims Commissioner was not a "purely executive" office because its duties were quasi-judicial in nature. *Id.*, at 354. Examining the relevant legislative history, the Court found a Congressional intent for independence from the Executive because the initial versions of the pertinent legislation had conferred the resolution of war claims on the Federal Security Administrator, "indubitably an arm of the President," *ibid.*, while the legislation finally enacted established the War Claims Commission as a body independent of the President. Based on that functional analysis and determination of Congressional intent, the Court implied a preclusion of Presidential removal power as to the War Claims Commissioner. *Id.*, at 356.

The *Wiener* decision articulates the dual functional distinction drawn in *Humphrey's Executor* as follows:

> "[*Humphrey's Executor*] drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus *removable by virtue of the President's constitutional powers*, and those who

> are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,' 295 U.S., at 625-626, *as to whom a power of removal exists only if Congress may fairly be said to have conferred it.*" *Id.*, at 353 (emphasis added).

The Court in *Wiener* thus contrasted the "President's constitutional powers" of removal, which apply to purely executive officers under the limited *Myers* rule, with the existence of such Presidential removal power only as conferred by the Congress. The latter rule applies to those officers who perform predominantly quasi-legislative and quasi-judicial functions under the rationale of *Humphrey's Executor*. This language by the Court in *Wiener* can only be construed to lodge removal power in the Congress with respect to those not "purely executive" officers who come within the holding of *Humphrey's Executor*.[11]

1. *The Office of Comptroller General is Not "Purely Executive" in Nature.*

Application of the functional test suggested by *Humphrey's Executor/Wiener* clearly reveals that the Comptroller General constitutionally may be subjected to Congressional removal power. Like the FTC Commissioner in *Humphrey's Executor*, the Comptroller General performs a mix of functions that partake predominantly of the legislative power, but also include functions of a judicial and executive nature.[12] As even the District Court

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[11] See *Buckley* v. *Valeo*, 424 U.S., at 276 (White, J., concurring in part and dissenting in part) (officers such as FTC are "immune from removal by the President except on terms specified by Congress"); L. Tribe, *supra* n.7, at 189 n.18 (referring to Congress' removal power); Burkoff, Appointment and Removal Under The Federal Constitution: The Impact of Buckley v. Valeo, 22 Wayne L. Rev. 1335, 1409 (1976) (*Wiener* decision "divested the President of any removal power *whatever*").

[12] The District Court inaccurately posited that all of the functions delegated to the Comptroller General under law, aside from those assigned under the Act, are legislative in character. J.A. 71

conceded, consideration of all of the functions of the office compels the conclusion that the Comptroller General is not a "purely executive" officer within the meaning of the *Myers* rule requiring Presidential removal power. J.A. 71.

2. *The Congress Clearly Intended That The Comptroller General Be Independent of The President.*

Having eliminated application of the restricted exception in *Myers* for "purely executive" officers, *Humphrey's Executor* and *Wiener* require that the analysis next turn to legislative history to determine whether Congress intended that the Comptroller General act independently of the President. The answer is yes. The General Accounting Office ("GAO"), which the Comptroller General heads, was established by the Congress as "an instrumentality of the United States Government independent of the executive departments." 31 U.S.C. § 702(a) (1982). The GAO has been described by Congress and the Court as an independent, non-political, non-partisan agency.[13] As the District Court's decision recognizes, J.A. 51, the GAO's expertise in accounting and economic calculations makes it a body of experts like other independent agencies.

Moreover, the legislative history of the Act, just like that in *Wiener*, reveals that the Congress rejected a pro-

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& n.29. In addition to his many quasi-legislative functions cited by the District Court, the Comptroller General, an officer historically first located within the Treasury Department, also carries out functions partaking of executive and judicial qualities. See, e.g., 31 U.S.C. § 3323(a)(3) (1982) (countersigning with Secretary of Treasury warrants for disbursements of public funds); 31 U.S.C. §§ 3526, 3702 (1982) (settling claims of or against the United States); 31 U.S.C. § 3717(h) (1982) (prescribing standards for collections of debts owed the United States); 31 U.S.C.A. §§ 3551-3556 (1985 West Cum. Pocket Part) (adjudicating protests of government procurement statute violations).

[13] General Accounting Office, Functions of The Accounting Office, S. Doc. No. 96, 87th Cong., 2d Sess. 1 (1962). See *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 844 (1983).

vision that would have placed the fact-finding tasks in the control of the OMB, an office considered by the Congress to be an arm of the President.[14] The legislation as ultimately enacted assigns the fact-finding tasks to the Comptroller General precisely because the Congress intended that those tasks be performed independently of the President. Rather than placing the fact-finding functions in the hands of the OMB, an arm of the President, or under the direction of the CBO, whose head is appointed and removable solely by the Congress, the Act strikes a compromise by delegating those functions to the Comptroller General, who is appointed by the President but is removable by the concurrent action of both the Congress and the President.

3. *The District Court Erroneously Focused Only on The Tasks Assigned Under The Act.*

The foregoing analysis places the removal powers issue presented here squarely within the *Humphrey's Executor/Wiener* rationale, requiring that the constitutionality of the Act be confirmed. The District Court, however, strained to take the Comptroller General outside of the *Humphrey's Executor* rule, and thus to find constitutional infirmity in the Act.[15] By focusing its functional analysis

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[14] See Democratic Study Group, Special Report: The Gramm-Rudman Proposal, reprinted in 131 Cong. Rec. S12974, 12978 (daily ed. Oct. 9, 1985); 131 Cong. Rec. H9598 (daily ed. Nov. 1, 1985) (remarks of Rep. Brooks); The Budget Outlook and Its Economic Implications: Hearings Before The House Comm. on The Budget, 99th Cong., 1st Sess. 39 (1985) (remarks of Rep. Gray); 113 Cong. Rec. H9597 (daily ed. Nov. 1, 1985) (Rep. Rostenkowski) ("Under Gramm-Rudman [as originally proposed], the President could orchestrate the cuts through OMB").

[15] The District Court's failure to find *Humphrey's Executor* controlling must be viewed as arising in part from that Court's dissatisfaction with that decision. Indeed, the District Court recites numerous reasons for its disagreement with the decision: for example, *Humphrey's Executor* reflects the politics of its day and the Supreme Court's hostility towards President Roosevelt; independent

solely on the tasks performed by the Comptroller General under the Act, and by characterizing those particular functions as purely executive, the District Court returned the analysis to the rigid, and now limited, *Myers* rule, requiring illimitable Presidential removal power. While proclaiming that this case "falls neatly between the two stools of *Myers* and *Humphrey's Executor*," J.A. 71, the District Court actually seats its conclusion squarely upon the *Myers* rule.[16]

Despite the focus by this Court in *Humphrey's Executor* on the overall functions of the officer, the District Court's decision rejects that "admixture" approach as not "congressionally knowable" or "judicially manageble." J.A. 74. Instead, the District Court's analysis is a rigid, two-part test: if (1) the *particular* function of the officer, examined in isolation from his other duties, is "purely executive," and (2) the officer performing that function is not removable by the President, then the separation of powers doctrine is violated. Carried to its logical conclusion, the rigid separation of powers analysis applied by the District Court would call into question the constitutionality of the performance by *any* officer of *any* branch of government of *any* one function partaking "purely" of the powers of another branch. The separation of powers doctrine does not require this sort of "hermetic

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agencies constitute a headless fourth branch of government and do not fit within the constitutional scheme; and independent agencies no longer function as independent experts and no longer require the protection from political intervention intended by *Humphrey's Executor*. J.A. 68-69. None of these indictments of *Humphrey's Executor* either requires the Court to disregard its prior holdings or weighs in favor of invalidation of the balanced budget legislation at issue here.

[16] This is apparent from the District Court's dicta indicating its view that the President must have illimitable removal power over the Comptroller General before that officer could perform the fact-finding tasks assigned him under the Act. J.A. 61.

sealing off of the three branches of Government from one another . . . ." *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976).

Application of the rigid test fails to take account of the realities of modern government in which many officers, and particularly officers in independent agencies such as the Comptroller General, perform functions which necessarily partake of legislative, judicial and executive qualities.

As Justice Jackson aptly noted:

> "[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), *quoted in part in United States* v. *Nixon*, 418 U.S. 683, 707 (1974).

In the context of a massive federal government called upon to perform the innumerable complex functions required by a modern society, "[a]ny notion that the Constitution bans any admixture of powers that might be deemed legislative, executive, and judicial has had to give way." *Buckley* v. *Valeo*, 424 U.S., at 281 (White, J., concurring in part and dissenting on other grounds). The separation of powers doctrine must admit of some overlap between the branches in the context of the present removal issue. Such a permissible overlap was recognized in *Humphrey's Executor*, where the Court expressly noted that those non-"purely executive" officers contemplated by its holding may engage in executive functions that are collateral to their quasi-legislative and quasi-judicial duties. 295 U.S., at 628 & n.*.

The *Humphrey's Executor* functional analysis considers all of the duties performed by the officer. Regardless of the characterization of the particular tasks assigned the Comptroller General in the Act as "purely executive" or otherwise, no violation of the separation of powers doctrine is implicated. Those paritcular tasks are properly considered as mere adjuncts to the other quasi-legislative functions of the office, which require the Comptroller General to engage in economic calculations, bookkeeping and accounting duties.

4. *The Comptroller General's Functions Under The Act are Not "Purely Executive."*

Even assuming that the functional analysis can properly be focused solely on the tasks delegated to the Comptroller General under the Act, the practical realities of the budgetary process belie any characterization of those duties as solely executive. The Act solves the Congress' problem presented by its inability to engage in budgetary discipline by requiring the Congress to meet certain specified budget deficit reduction levels. It is in large measure a delegation, albeit a clearly permissible one, of legislative powers. It is, however, an extremely limited delegation. The Congress already has specified the required spending cuts in the Act itself, leaving the Comptroller General with only the task of calculating those reductions based on the Act's formula.

By making those estimates and calculations, the Comptroller General is merely "filling in and administering the details" of the Act pursuant to the standards established in the statute. *Humphrey's Executor*, 295 U.S., at 628. Those duties thus are like the quasi-legislative fact-finding engaged in by other independent agencies. The Comptroller General's consideration of the reports of the OMB and CBO may be characterized in part as requiring an adjudication of sorts between the two, thus giving a quasi-judicial character to the Comptroller Gen-

eral's duties. Finally, those functions doubtless also place the Comptroller General in a limited interpretive role, since he necessarily must construe the Act in order to make the fact-findings required of him under the Act. It thus should be clear that the Comptroller General's tasks under the Act are of a mixed character. They have quasi-legislative, quasi-judicial, and quasi-executive qualities. They can in no way, however, be properly pigeonholed only within the purely executive category.

The District Court characterizes the Comptroller General's fact-finding functions as "purely executive" because the Act denies discretion to the President to alter the Comptroller General's calculations of the spending reductions. That argument proves too much. If the legislative inertia regarding the budget restraint could be overcome, the Congress certainly could pass legislation, with the approval of the President or by overriding his veto, calling for spending cuts by specific amounts per program needed to reach a balanced budget. The Congress thus could make the calculations and enact spending cuts based on those numerical results, leaving the President no discretion but to enforce those cuts. The constitutionality of such a deprivation of Presidential discretion in enforcing the required spending reductions cannot be doubted. Precisely the same thing is required by the Act—the Congress has legislated specific spending cuts per program, only replacing the specific figures for such reductions by a formula to be calculated by the Comptroller General. The restriction of Presidential discretion in enforcement of the Act is accomplished by Congress' enactment of the Act in the first instance, and not by any subsequent calculations performed by the Comptroller General. The mere deprivation of Presidential discretion cannot constitute the Comptroller General's calculation an "executive" act, nor can it imply a separation of powers violation.[17]

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[17] The same analysis invalidates the District Court's conclusion that the Comptroller General's fact-finding functions constitute a

B. The Limited Congressional Power to Participate in The Removal Process Does Not Unconstitutionally Impinge on The Appointments Power of The Executive.

Because the Comptroller General's functions, whether considered in toto or in isolation only as to those tasks assigned in the Act, are not "purely executive," this Court's decisions indubitably hold that the Congress may constitutionally restrict or confer the power to remove that officer. It remains only to determine whether the Act violates the separation of powers doctrine because the independent agent selected to perform the fact-finding tasks is, by a separate statute passed sixty-five years earlier, made removable by the concurrent action of the Congress and the President. The District Court assumed that limited Congressional participation in the removal process runs afoul of the adage that the power of removal is an incident of the power of appointment. The "tyranny of adages," however, presents as "fertile [a] source of perversion in constitutional theory" as does the "tyranny of labels" decried by Justice Cardozo in *Snyder* v. *Massachusetts*, 291 U.S. 97, 114 (1934). Indeed, this Court's holding in *Humphrey's Executor* rejects that notion, proving that the constitutional power to remove does not follow the constitutional power to appoint in all instances.

By juxtaposing in *Wiener* the *"President's* constitutional" power of removal as applied in *Myers*, with the power of removal under *Humphrey's Executor*, which exists "only if *Congress* may fairly be said to have conferred it," this Court inferred that there is no constitutional Presidential removal power in the latter instance.

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before-the-fact prescription of the President's executive power comparable to the legislative veto found unconstitutional in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Prior Congressional prescription of Presidential discretion in enforcement of law clearly presents no constitutional infirmity such as that found with respect to the legislative veto.

Wiener, 357 U.S., at 353 (emphasis added). Where it is the province of the Congress to confer, or not to confer, the authority to remove, constitutional removal power can only be said to be lodged in some measure with the Congress, and not solely with the President. The power of removal being lodged in part with the Congress, the assertion by the Congress of a limited right to exercise that power can in no way imply any constitutional infirmity.

It does not follow from the constitutional authority of the Congress to participate in the removal of the Comptroller General in this case, however, that the Comptroller General serves only at the whim of the Congress. The relevant statute permits removal only for certain specified causes.[18] The Congress can exercise such removal only by joint resolution, which is subject to Presidential approval or veto.[19] The Congress clearly does not "control" removal where the President consents to and signs, or otherwise fails to veto the joint resolution. In that instance, it is the President's action that makes removal effective. If the President disapproves of the removal, Congressional "control" results only by an override of that veto, requiring a two-thirds vote of all members of Congress. It is no easier for the Congress to remove, over Presidential veto, the Comptroller General than it is for the Congress to pass any other law vetoed by the Executive. The Congress' constitutional capacity to exercise a limited removal power over the Comptroller General, subject to Presidential veto, is no different from the obvious Congressional authority to enact legislation, subject to

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[18] The removal statute originally was enacted in the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, 23-24 (1921). As amended, it is now codified at 31 U.S.C. § 703(e)(1) (1982).

[19] It should be noted that the Congress has never attempted to exercise the power to remove a Comptroller General in the sixty-five years since the enactment of the provision in the Budget and Accounting Act of 1921 authorizing such removal. This fact should weigh heavily against the District Court's assumption that the Comptroller General would fear Congressional removal, and thus, must be considered subject to Congressional "control."

Presidential veto, abolishing the General Accounting Office of which the Comptroller General is head. With respect to non-purely executive offices, the constitutionality of the latter action establishes in like manner the constitutionality of the former.

In addition to forcing the Congress to put its own budgetary house in order, the Act represents a political accommodation between the Legislative and Executive Branches concerning the handling of their joint responsibilities in budgetary legislation. The delegation of the fact-finding tasks to the OMB, a purely executive office, or to the CBO, a purely legislative one, was rejected in favor of a compromise between the two branches. Those tasks were instead assigned to an independent agent, the Comptroller General. It is fitting that the key player in the automatic spending reduction scheme, the Comptroller General, should be subject to removal by joint action in which both the Congress and the President have a voice. Constitutional symmetry in the locus of the appointment and removal power is apparent and appropriate—the Congress and the President participate in both the appointment and removal of the independent agent whose functions under the Act bridge the gulf between the two branches encountered in the deficit crisis.

Affirming the constitutionality of the Comptroller General's functions under the Act does not imply a Congressional removal power as to all officers of the United States.[20] Nor does the joint participation by the Congress and the President in the removal process here indicate a deprivation by one branch of core functions representing the very essence of the powers assigned by the Constitution to another branch. See *Northern Pipeline Construction Co.*

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[20] Officers performing exclusively executive functions, such as an officer solely engaged in prosecutorial functions, must be subject to Presidential appointment and removal, at least for cause. See Baker, The Proposed Judicially Appointed Independent Office of Public Attorney: Some Constitutional Objections and An Alternative, 29 Sw. L.J. 671, 675 (1975).

v. *Marathon Pipe Line Co.*, 458 U.S. 50, 74 (1982). This case simply does not involve the encroachment of one branch upon the powers reserved to another. The functions performed by the Comptroller General are by no proper measure accurately described as core executive functions—they typify instead the mixed qualities representative of all three branches. The Congress has not engaged in any wholesale deprivation of the executive function merely by granting a fact-finding role in the budgetary process to an officer who is subject to removal only under very limited circumstances, and who, under this Act, engages in functions partaking of the legislative, judicial and executive powers.

CONCLUSION

The Act is a unique solution to a unique problem of constitutional omission—the absence of any mandatory constitutional relationship between the spending power and the revenue-generating power of the federal government. In terms of the practical realities of government, it represents the last available means to achieve such a balance absent a new constitutional mandate. It is the Congress' way of dealing with the hard political choices that have prevented budgetary restraint in years past. On this largely political question, great deference to the considered judgment of the Legislative and Executive Branches is required. The Constitution should not be applied as a straightjacket to preclude a flexible approach to solve a unique, but critical problem facing our government. The constitutionality of the Act should be affirmed. The decision of the District Court should be reversed.

Respectfully submitted,

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